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IN THE

Supreme Court of the United States

October Term 1956

No. 755

CARL DRATH t/a BROADWAY GIFT COMPANY,
Petitioner

v.

FEDERAL TRADE COMMISSION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Other Authorities:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REASONS RELIED ON FOR ALLOWANCE OF WRIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Carl Drath, an individual t/a Broadway Gift Company, respectfully petitions this Honorable Court for a writ of certiorari to review a judgment and decree of the United States Court of Appeals for the District of Columbia Circuit.

I. ORDER BELOW

The judgment and the final decree of the United States Court of Appeals for the District of Columbia Circuit,

review of which is hereby sought and which were entered December 13, 1956 and January 9, 1957 respectively, are set forth in the Appendix at pages [illegible]. The opinion of the Court is set forth in the appendix at page 39.

II. JURISDICTIONAL STATEMENT

Jurisdiction of the Honorable Court is invoked under the provisions of the Act of June 25, 1948, 62 Stat. 928 (28 USC 1254)

III. QUESTIONS PRESENTED

1. Does the Federal Trade Commission have authority to declare unfair and deceptive and to restrain and prohibit the distribution in interstate commerce of printed material which can or may be used by others than the distributor in the disposal of merchandise in intrastate commerce by means of lot or chance?

2. Is the decision of the United States Court of Appeals for the District of Columbia Circuit, in conflict with the decision of this Honorable Court in *United States* v. *Halseth*, 72 S. C. 275, 342 U. S. 277, that punchboards are not to be added to the category of those devices which are to be excluded from the mails and from interstate commerce unless and until Congress makes the addition?

3. Can the Federal Trade Commission lawfully base its cease and desist order on the involuntary testimony of a party respondent to its adjudicatory proceeding, given under compulsion of a Commission subpoena in the light of the immunity granted by Section 9 of the Federal Trade Commission Act of 1914?

4. Can the Federal Trade Commission under the Administrative Procedure Act, impose the specific sanction covered by the cease and desist order here involved, where

Congress has refused or failed to specifically delegate that jurisdiction to the Commission?

5. Can the Commission issue a valid cease and desist order where only three of the five Federal Trade Commissioners, who voted unanimously, heard and decided petitioner's appeal from the Hearing Examiner's initial decision?

IV. STATUTES INVOLVED

The following are the material portions of Section 5, of the Federal Trade Commission Act, 15 USCA Sec. 45 (Sept. 26, 1914, c. 311, sec. 5, 38 Stat. 719; Feb. 13, 1925, c. 229, sec. 2, 43 Stat. 939; Mar. 21, 1938, c. 49, sec. 3, 52 Stat. 111; June 23, 1938, c. 601, sec. 1107(f), 52 Stat. 1028; June 25, 1948, c. 646, sec. 32(a), 62 Stat. 991; May 24, 1949, c. 139, sec. 127, 63 Stat. 107; Mar. 16, 1950, c. 61, sec. 4(c), 64 Stat. 21):

> "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. The Commission is empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> "(b) Whenever the Commission shall have reason to believe that any such person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person . . . a complaint stating its charges in that respect and containing a notice of hearing . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections . . . of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served

on such person . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice.

"(c) Any person . . . required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person . . . resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside . . . .

"(d) The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive....

"(1) Any person . . . who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

The pertinent portion of Section 9 of the Federal Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 722 (15 USCA 49), reads:

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on acocunt of any trans-

action, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it . . ."

The pertinent portion of Section 1 of the Federal Trade Commission Act of 1914 C. 311, 38 Stat. 717; March 21, 1938 C. 49 Sec. 1, 52 Stat 111 (15 USC 41) is as follows:

"A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed; Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the commission's membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."

The Administrative Procedure Act, June 11, 1946, c. 324, sec. 2, 60 Stat. 237, as amended, Title 5, sec. 1001 (f) U. S. C. A.:

"'Sanction' includes the whole or part of any (1) prohibition, requirement, limitation, or other condi-

tion affecting the freedom of any person * * * or (2) taking of other compulsory or restrictive action."

Title 5, sec. 1008:

"In the exercise of any power or authority—(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

V STATEMENT OF THE CASE

On the 24th day of February 1954, the Federal Trade Commission caused to be issued and served upon petitioner, a complaint charging petitioner with the sale and distribution of merchandise in interstate commerce by means of games of chance, gift enterprise or lottery scheme; alleging that petitioner distributed to the public push cards, together with certain literature, instructions and circulars describing and explaining petitioner's plan of sale and distribution of his merchandise, and that petitioner thereby supplied to and placed in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes, contrary to the public interest and constituting unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

On March 22, 1954, petitioner filed his answer and defenses to the complaint. Thereafter a hearing was held on May 12, 1954, before a Hearing Examiner for the Commission, at which hearing petitioner, under compulsion of a Commission subpoena, testified at the behest of the attorney supporting the complaint. The testimony of three other witnesses, as well as certain documentary evidence, was also offered in support of the complaint. Petitioner moved to strike the testimony of the Commission's witnesses on the grounds that it was immaterial, irrelevant and incompetent, and moved to dismiss the complaint on the ground that the Commission had failed to

establish a prima facie case by substantial, credible evidence, which motions were denied.

On September 14, 1955, the Hearing Examiner issued his Initial Decision, sustaining the complaint and recommending the issuance of a cease and desist order. Petitioner on October 5, 1955, filed a notice of intention to appeal the decision to the Commission and, after briefing and oral argument before three of the five Commissioners then holding office as such, the Commission (Commissioners Mason and Secrest not participating), under date of February 16, 1956, issued its Opinion denying petitioner's appeal and affirming the Hearing Examiner's decision, and issued a Final Order requiring petitioner within sixty days to file with the Commission a report setting forth the manner and form in which he has complied with the order requiring him to cease and desist from:

> "1. Supplying to or placing in the hands of others pull cards, push cards or any other devises which are designed or intended to be used in the sale or distribution of respondent's [petitioner's] merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.
>
> "2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprises or lottery scheme." (Word in brackets added).

A copy of the Commission's Opinion and Final Order were served on petitioner on February 24, 1956, and petitioner on March 5, 1956, filed a petition for reconsideration and rehearing which petition was denied by order of the Commission entered March 15, 1956.

Petitioner then timely filed in the U.S. Court of Appeals for the District of Columbia Circuit on April 23, 1956, his petition to review and set aside the order of the Commission, and filed brief in support of said petition.

After briefs and oral arguments of both parties before

Circuit Judges Wilbur K. Miller, Fahy and Danaher, the said Court of Appeals, on December 13, 1956, issued and filed its decision and judgment (App. 18-21), ordering and adjudging that the order of the Federal Trade Commission on review be affirmed and, pursuant to Rule 38 (b) of the said Court, that the Commission submit a proposed enforcement decree.

On January 9, 1957, the said Court entered its Final Decree Affirming and Enforcing the Order to Cease and Desist (App. 21), wherein the petition for review was dismissed, the Commission's order to cease and desist was affirmed and enforced and petitioner commanded to obey said order to cease and desist, to comply therewith and, within ninety days thereafter, to file with the Commission a written report, setting forth in detail the manner and form in which petitioner has complied; the said Court announcing it retains jurisdiction of the cause to enter such further orders from time to time as may become necessary effectively to enforce compliance in every respect with the decree and to prevent evasion thereof.

VI. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The Federal Trade Commission is without authority to declare as unfair and deceptive and to restrain and prohibit the distribution, in interstate commerce, of printed material and merchandise which can or may be used by others in the disposal or distribution of merchandise in intrastate commerce by means of lot or chance.

2. The decision of the United States Court of Appeals for the District of Columbia Circuit is in direct conflict with the decision of this Honorable Court in *United States* v. *Halseth, supra,* holding that punchboards are not to be added to the category of those devices which are to be excluded from either the mails or from interstate commerce

unless and until Congress has made the addition—which has not been done.

3. The Federal Trade Commission cannot lawfully base a cease and desist order upon the involuntary testimony of a respondent, given under compulsion of a Commission subpoena, in the light of the immunity granted by Section 9 of the Act.

4. Congress never has delegated to the Federal Trade Commission jurisdiction to impose the sanction covered by the cease and desist order here involved and such imposition is therefore prohibited by the Administrative Procedure Act.

5. The Commission, being composed of five Commissioners, can issue a valid order to cease and desist, only when all of the Commissioners then serving as such, have participated in hearing and deciding an appeal.

VIII SUMMARY OF THE ARGUMENT

(a) The cease and desist order as affirmed is too broad and beyond the Commission's jurisdiction, since it imposes prohibitions upon purely intrastate commerce.

(b) The judgment and decree below is directly contrary to this Honorable Court's decision in *United States* v. *Halseth, supra.*

(c) There was denial of due process of law in basing the order to cease and desist, as affirmed, upon involuntary testimony of petitioner given under compulsion of the Commission's subpoena, in the light of the immunity provisions of Section 9 of the Act.

(d) The cease and desist order, as affirmed, violates the provisions of the Administrative Procedure Act.

(e) Since the Commission's function in issuing an order to cease and desist is quasi-judicial in nature, it

cannot issue a valid order unless all members of the Commission then serving as such, participate in the Commission's appellate procedures.

IX ARGUMENT

(a) The order as affirmed exceeds the Commission's authority in that it restricts intrastate Commerce.

1. The order as affirmed is in two parts: "supplying to or placing in the hands of others pull cards, push cards or any other devices which are designed or intended to be used in the sale or distribution of "merchandise by means of a game of chance, gift enterprise or lottery scheme; and "selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme."

2. Petitioner distributes free pull or push cards, which are similar in use to punch boards as well as "grab-bag" catalogues. He also sells articles of merchandise which may or may not be distributed by use of the cards and catalogues. Nowhere does the order limit these proscribed acts to interstate commerce. Petitioner sells in intrastate as well as in interstate transactions. He is a supplier and in no sense an operator of the material. He is precisely in the status of distributors of ordinary playing cards, bingo material, dice and similar materials used historically for winning prizes of both merchandise and money—but none of which are prohibited in either the mails or interstate commerce. A number of states and municipalities for years have permitted the use of punchboards, pull and push cards—usually under license.* Most

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* Connecticut, Florida, Georgia, Illinois, Montana, Nevada, North Carolina and West Virginia. Albany, Astoria, Bend, Coos Bay, Klamath Falls and Portland in Oregon; Bellingham, Chehalis, Hoquiam, Olympia, Raymond, Seattle, Vancouver, Walla Walla and Wenatchee, in Washington.

certainly the second order provision can apply only to a person who, and only who, disposes of or sells merchandise by *use* of the material and after it has left the petitioner.

3. Where petitioner's cards are used by the purchasers for their distribution of merchandise, that operation obviously is purely intrastate and not petitioner's. Just as obviously, while petitioner's products were in interstate commerce there was no distribution or sale of merchandise "by means" of a game of chance, gift enterprise or lottery scheme. When the so-called Wheeler-Lea amendment to the Federal Trade Commission Act was before the Senate, the Commission had asked for power to reach cases where the operation "affected" interstate commerce, regardless of whether the respondent was engaged in commerce or the acts done in the course of commerce. Senate Report No.46, 74th Cong. 1st Session. The Committee recommended the amendment, but when it reached the floor, the following occurred:

> "Senator Wheeler: The only modification of the paragraph to which the Senator calls attention is the insertion of the words 'or affecting'.
> "Senator Austin: Yes, Mr. President; but apparently that is what is the trouble with the bill. Congress has gone as far as it had any right to go when it undertook to regulate and deal with unfair trade practices in commerce • • •.
> "Senator King: As I understand it, the Senator's position is that the language of this provision is too broad and that it would give the Commission the right to go into a state and investigate intrastate commerce exclusively where it clearly and obviously was intrastate instead of interstate commerce."
> "Senator Austin: I do take that position. • • •
> "Senator Borah: I do not think we can authorize the Trade Commission to deal with intrastate affairs. I think if we should undertake to do so, our action would be held invalid." Cong. Record Vol. 79, Part II, pp. 1842 *et seq.*

4. Upon reconsideration, the proposed amendment went over and was not brought up again at that session. In the next session, (Senate Bill 3744) the proposed extending phrase was omitted and, with such omission, became the Wheeler-Lea Amendment. (74th Cong., 2nd Sess. Senate Debate, Con. Record Vol. 80, pp. 6588 *et seq.* 6603 and 6702.)

5. The clear conclusion is that Congress disapproved the requested extension of the Commission's powers.

(b) The judgment and decree directly conflict with this Honorable Court's decision and the repeated flat refusal of Congressional authority.

6. In *U.S.* v. *Halseth, supra,* Mr. Justice Minton wrote the opinion. Halseth had mailed written matter and punchboards, showing how the latter were to be used and how the merchandise prizes could be procured from him. He was indicted under the postal laws. The Court said the question was "whether the mailing of gambling paraphernalia that may be used to set up a lottery or similar scheme is a violation of the statute." It quoted from *France* v. *U. S.,* 164 U. S. 676, 17 S. Ct. 219, and cited others. It also expressed the identical reasoning adopted by petitioner here—that the mailing of punchboards and paraphernalia for merchandise sales by the purchasers in a game of chance does not mean that the distributor of the punchboards is in any manner engaged in the operation of the game. But the important and concluding holding in Halseth, which we contend completely answers our question, is that Congress has had before it many times the question of what gambling devices and paraphernalia it would exclude from not only the mails but from interstate commerce. It cited the somewhat recent slot machine legislation and concluded that "If punchboards are to be added to the category of devices to be excluded, it is for Congress to make the addition."

7. The U.S. Court of Appeals for the District of Columbia Circuit rejected Mr. Justice Minton's statements in its decision in *Hamilton Mfg. Co.* v. *Federal Trade Commission,* 194 F.(2d) 346. It rejected them again in the present case. It rejected them in *U.S. Printing & Novelty Co.* v. *Federal Trade Commission,* 204 F.(2d) 637 and in *Seymour Sales Co.* v. *Federal Trade Commission* 216 F.(2d) 633. But this Honorable Court, in *Federal Communications Commission* v. *American Broadcasting Co.* 347 U.S. 297, 74 S. Ct. 593, later cited its own *Halseth* decision, and denied to that Commission the power to prohibit broadcasting so-called "give-away" programs. It noted that that Commission, (like the Post Office Department and the Federal Trade Commission) had urged Congress, without success, to grant the authority—but that now the Commission "seeks to accomplish the same result through agency regulations." This Honorable Court held that in so doing the Commission overstepped the boundaries of interpretation and exceeded its power. (p. 296) Here, therefore, we have three separate agencies we say engaged in the same excessive zeal to enlarge their coverage, all three on the identical subject matter. Two have been stopped. We ask that the third be stopped and the Court below be reversed.

It should further be noted that United States v. Halseth (supra) is the only case in which this Honorable Court has directly considered and passed upon the issue as to whether the operation of this identical type of business offends against the laws of the United States. A number of other United States Circuit Courts of Appeals, as has the Court below, in upholding the Federal Trade Commission in cases involving similar methods of distributing merchandise, have relied primarily on the decision of this Court in Federal Trade Commission v. Keppel & Bro. 291 U.S. 304 decided February 5, 1934. Unlike here, Keppel sold and distributed in interstate commerce package assortment of candies known to the trade as "break

and take" packages, in competition with manufacturers of assortments known as "straight goods" packages—a method of competition which induces children "too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity that that offered at a comparable price in the straight goods package". The chance features were inherent in the merchandise itself as packaged by the manufacturer. In no case has this honorable court directly interpreted the "unfair and deceptive practices" language written into Section 5 of the original FTC Act by the 1938 Amendment as an addition to the "unfair methods of competition" language of the 1914 Statute,—as applying to activities of the type shown here.

No merchandise is offered except as a straight sale and there is no element of a lottery built into the package. Even the push card distributed by petitioner bears the statement: "This card is given to you absolutely FREE. If you wish you can use this as a sales card. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO ANY TIME". (Record: Exhibit 1-C). Furthermore it was never shown that any member of the public ever operated one of the fifty to one hundred thousand cards sent out by petitioner. As to the sales catalogue (Record Exhibit 2 C) it should be noted that same consists of a series of pull tabs, each of which calls for a specific article of merchandise at a fixed price, with an additional article of merchandise to be awarded to one of the purchasers of same. There is also included a notice to a prospective purchaser that "If you are not satisfied with the item you picked, you are not obligated to buy it"

8. The consistent refusal of Congress to grant the asserted power has covered a period of over forty years.

66th Cong., S. 1541 by Senator Sheppard; 68th Cong., H. R. 6071, Rep. Purnell; 69th Cong., H. R. 3935, Rep. Purnell, and H. R. 4004, Rep. Dyer; 70th Cong. H. R. 387, Rep. Dyer; 71st Cong., S. 2751, Sen. Sheppard, and H. R. 2408, Rep. Dyer; 72nd Cong. S. 182 and S. 2570, Sen. Sheppard, H. R. 353 and H. R. 7537, Rep. LaGuardia; 73rd Cong. S. 3076, Sen. Sheppard and S. 2559, Sen. Reynolds, 74th Cong. S. 6, Sen. Copeland; 75th Cong. H. R. 4796, Rep. Sachs; 76th Cong., H. R. 7464, Rep. Geyer. When, in 1950, S. 3357 prohibiting slot machine interstate transportation, was before the House Interstate & Foreign Commerce Committee, the Department of Justice, which drafted the bill, stated it had considered including punchboards but recommended against it. Hearings before that Committee, 81st. Cong., 2nd Sess. pp. 35 *et seq.* Mr. Justice Hughes, in *Carey* v. *Donohue, Trustee*, 240 U. S. 430, 437, stated that where there was deliberate refusal of Congress, the courts were not at liberty to supply by construction what Congress has clearly shown its intention to omit. We contend that both the court below and the Federal Trade Commission have disregarded this sound doctrine.

(c) There was a denial of due process of law in basing the order to cease and desist, as affirmed, upon involuntary testimony of petitioner given under Commission subpoena in the light of the immunity provisions of the Act.

9. During the course of the hearing before the Commission, petitioner, under command of a subpoena issued by the Commission, appeared and testified at the instance of the attorney supporting the complaint (App. 27, 30). Petitioner thereby secured the immunity specifically provided by Section 9 of the Federal Trade Commission Act (15 USCA 49) (supra p. 4)

10. Judge Prettyman of the same Court below in his dissent in *Lee* v. *Civil Aeronautics Board* (1955), 225

F. (2d) 950, succinctly covered the issue here involved. The proceeding there involved a petition by the Administrator of Civil Aeronautics for review of an order of the Civil Aeronautics Board dismissing complaints in which the Administrator asked the Board to suspend certificates of certain pilots for violation of civil air regulations. The majority of the Court held that the Administrator had no standing under the statute involved to appeal from a decision of the Board, and dismissed his petition. Judge Prettyman held the Administrator had such right to judicial review, but held that since the pilots in testifying before the Board claimed the privilege of the self-incriminating clause of the Fifth Amendment and of the Act,[2] they were protected and the Board was correct in holding that it could not suspend the pilots' licenses, the men havbeen compelled to testify against themselves. Judge Prettyman stated:

> "The suspension of these pilots would be a forfeiture of a privilege, even if not of a right. The immunity statute extends to forfeitures as well as to penalties. The question, then, is whether the proceeding is punitive or merely remedial. In this connection we go to the Fifth Amendment cases. Any reading of the complaint shows that the action prayed for is purely punitive. The complaint says badly that the men were

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[2] Civil Aeronautics Act of 1938, as amended, Sec. 1004(i), 52 Stat. 1021 (49 USCA 644(i)), which provides:

"No person shall be excused from attending and testifying, or from producing books, papers, or documents before the Board, or in obedience to the subpoena of the Board, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise . . ."

careless and therefore ought to be suspended. It does not allege the pilots to be unqualified. I think they were protected by reason of their testimony taken in the investigation."

11. Since the language of the immunity provisions of the Civil Aeronautics Act and of the Federal Trade Commission Act are practically identical (except that in the former, formal invoking of the privilege against self-incrimination is necessary), how then can it be said that the immunity applies in one case but not in the other. Just as surely as in the *Lee* case, *supra*, petitioner here is being subjected to the penalty and forfeiture prescribed by the Federal Trade Commission Act, and by the Commission's order based upon the immunized testimony of petitioner.

12. This Honorable Court only recently had before it in *United States* v. *Minker*, 350 US 179, the question of the right of an immigration officer to subpoena a naturalized citizen who was the subject of an investigation by the Immigration Service, where the purpose of the investigation was to determine if good cause existed for the institution of denaturalization proceedings against such naturalized citizen. Section 235 (a) of the Immigration and Nationality Act of 1952, c. 4, Sec. 235, 66 Stat. 198 (8 USCA 1225(a)) provides that "any immigration officer . . . shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers . . . relating to the privilege of any person to enter, re-enter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." The Court held that the term "witness" as used in the statute did not encompass a person who was a party to such a proceeding.

13. Although the *Minker* decision, *supra*, involved the refusal to obey a statutory administrative subpoena by a party to the proceeding, and not the question, as in the

instant case, of the right to use testimony obtained under such a subpoena to support a proceeding against the person giving it, yet a rational and logical application of that decision to the case at hand indicates that if a party to a proceeding cannot be compelled to testify in response to a subpoena, where, as in the *Minker* case, there is no provision granting to such individual immunity from the use of his testimony,—then certainly the testimony of a party given in compliance with a subpoena in a proceeding under an Act providing that he "shall not be excused from attending and testifying . . . on the ground . . . that the testimony . . . may tend to incriminate him or subject him to a penalty of forfeiture," is entitled to the immunity specifically provided by the Act. Such is the situation in the case here under consideration.

(d) The cease and desist order, as affirmed, is in violation of the Administrative Procedure Act.

14. The Administrative Procedure Act of June 11, 1946, c. 324, Sec. 10, 60 Stat. 243 (5 USCA 1009 (e)), specifically provides:

> "So far as necessary to decision and where presented the reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (2) *contrary to constitutional right, power, privilege, or immunity* . . ." (Emphasis supplied).

15. The said order, as affiirmed, illegally imposes a sanction upon petitioner. The Administrative Procedure Act, in section 1001 (f) defines a "sanction" as including, in whole or in part, any prohibition, requirement, limitation or other condition affecting the freedom of any person or the taking of other compulsory or restrictive action. It provides, in section 1008 that no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

16. The said order as affirmed prohibits the freedom of the petitioner to engage in business which not only is recognized as legal in large areas of the United States but also takes such compulsory action under direct threat of criminal contempt and very heavy civil penalties—as recited in the final decree and enforcement order. (App. 21, 22) We have shown conclusively above that jurisdiction not only has not been delegated to the agency but consistently and repeatedly over many years has been denied in the face of consistent and repeated requests of Congress.

(e) Since the Commission's function in issuing an order to cease and desist is quasi-judicial in nature, it cannot pass a valid order unless all members of the Commission then serving as such, participate in the Commission's appellate procedures.

17. The Commission's order and decision affirmatively states that two of the five Commissioners "did not participate in the decision of this matter." Therefore, since the Federal Trade Commission is an entity created by Congress consisting of five Commissioners, the Commission can only act in an adjudicatory capacity when it acts as a whole—that is, with all its members participating—subject only to the exception of Sec. 41, Title 15, USCA, when there is a vacancy. Notwithstanding the provisions of Sec. 1.9 of Title 16 of the Commission's Rules of Practice and Procedure, that a majority of the members shall constitute a quorum for the transaction of business, the Commission in the instant case seeks to act in its quasi-judicial capacity, and, therefore, since its functions are jurisdictional, it follows that without statutory authority to function through less than its full membership, the rule can have no application to a quasi-judicial proceeding such as here involved.

The Commission's quorum rule is, of course (and was apparently only so intended to be), applicable to adminis-

trative functions of the Commission, as distinguished from its statutory quasi-judicial function.

The Administrative Procedure Act of 1946, affirmatively states that in the exercise of any power or authority, no sanction shall be imposed or substantive rule or order be issued, except within jurisdiction delegated to the *agency* and as authorized by law (Title 5 USCA 1008). Likewise, since the Administrative Procedure Act (5 USCA 1006) specifically provides that "(2) one or more members of the body which comprises the agency", as one of the three alternatives, shall preside at the taking of evidence, and the first category is stated as "(1) the agency", without further qualification, it follows that had it been the intention of Congress to delegate quasi-judicial final adjudicatory authority to a majority of the Commissioners, Congress would have affirmatively said so, as it did in the sole instance cited above.

It is for Congress who created a judicial or quasi-judicial body consisting of more than one member, to specifically provide that such a body may function with less than its full membership. By analogy, reference is made to the statute fixing the number of judges of the Court below at nine (28 USC 44), with provision for the hearing and determination of cases and controversies by a court or division of not more than three judges (28 USC 46).

18. In disposing of this issue against petitioner's contention the court below relied on Frischer & Co. Inc. v. Bakelite Corp. 39 F (2d) 247 (CC PA 1930), in which the Court of Customs and Patent Appeals held the Tariff Commission to be entitled to act through a quorum of its members since it is solely an administrative agency having only fact-finding and not judicial powers, and then likened that agency to the Federal Trade Commisison on the authority of Federal Trade Commission v. Eastman Kodak Co. 274 U. S. 619, 623 (1927). However, this Honorable Court later said (1935) in Humphrey's Execu-

tor v. United States 295 U. S. 602 at page 628, with respect to the Federal Trade Commission:

> "In administering the provisions of statute in respect of unfair methods of competition—that is to say in filling in and administering the details embodied by the general standard—the Commission acts in part quasi-legislatively and in part quasi-judicially."

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Honorable Court grant his petition; issue its writ of certiorari to review the judgment and decree of the U.S. Court of Appeals for the District of Columbia Circuit; hear, consider and determine the questions presented; and reverse the judgment and order of the said Court of Appeals.

HORACE J. DONNELLY, JR.
WARREN W. GRIMES
Attorneys for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,303

CARL DRATH, t/a BROADWAY GIFT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of Order of the Federal Trade Commission

Decided December 13, 1956

Mr. Horace J. Donnelly, Jr., with whom *Mr. Arthur V. Sullivan, Jr.*, was on the brief, for petitioner.

Mr. J. B. Truly, Attorney, Federal Trade Commission, *pro hac vice*, by special leave of Court, with whom *Mr. Robert B. Dawkins*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* Carl Drath petitions for review of the Federal Trade Commission's order that he cease and desist from

> "1. Supplying to or placing in the hands of others pull cards, push cards or any other devices which

are designed or intended to be used in the sale or distribution of respondent's merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

"2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme."

Attending in obedience to a subpoena, Drath testified at the hearing which preceded the order. He said he had sent thousands of push cards and pull tab catalogues, "just as a sales stimulus," to persons on his mailing lists, some of whom ordered merchandise which he shipped to them. He insisted he knew nothing of what the recipients did with the push cards and other devices he sent them, and argues here that the practices interdicted by the Commission are not unfair within the meaning of § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45. As we said in the *Seymour Sales* case,[1] the argument comes too late, as the contrary has long been established. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304 (1934). Cf *Hamilton Mfg. Co.* v. *Federal Trade Commission*, 90 U. S. App. D. C. 169, 194 F. (2d) 346 (1952); *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, 92 U. S. App. D. C. 298, 204 F. (2d) 737, *cert. denied* 346 U. S. 830 (1953).

Drath further contends the cease and desist order should be set aside because the Commission unlawfully based it upon his testimony—without which, he says, the evidence was insufficient to support the order—in view of the immunity granted by § 9 of the Act, 14 U. S. C. § 49, which reads as follows:

• • • •

"No person shall be excused from attending and testifying or from producing documentary evidence

[1] Seymour Sales Co. v. Federal Trade Commission, 94 U. S. App. D. C. 403, 216 F. (2d) 633 (1954), *cert. denied* 348 U. S. 928 (1955).

before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

The statute does not immunize a witness from a cease and desist order, which is prospective only and has been aptly described as "purely remedial and preventative." *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673, 685, (8th Cir. 1926). Having determined—partly on the basis of Drath's description of his activities—that he had unlawfully used lottery devices in making interstate sales of merchandise, the Commission did no more than direct him to discontinue such practices. One is not prosecuted by being told to desist from illegal conduct, nor does he thereby suffer the imposition of a penalty or the forfeiture of any legally-protected right or property.

Drath attacks the order as invalid on the further ground that it was issued by only three of the five Commissioners. He urges that, except when there is a vacancy in its membership, the Commission can act in its adjudicatory capacity only when all five members participate. The agency's rule that "A majority of the members of the commission shall constitute a quorum for the transaction of business" can only be applicable, says the petitioner, to administrative functions. We think the quorum rule, which has been in effect throughout the Commission's life of more than 40 years, is a proper one, the Act being silent on the subject, and applies to all agency action. This is

in accord with the general rule. *Frischer & Co., Inc.*, v. *Bakelite Corp.*, 39 F. (2d) 247 (C.C.P.A. 1930), *cert. denied* 282 U. S. 852.

The order will be

Affirmed.

• • • •

JUDGMENT

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Federal Trade Commission on review in this case be, and it is hereby, affirmed.

It is FURTHER ORDERED, pursuant to Rule 33(b) of the General Rules of this Court, that the Commission within 10 days shall submit a proposed enforcement decree. Dated: December 13, 1956.

Per Circuit Judge Wilbur K. Miller.

• • • •

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Carl Drath, individually and trading as Broadway Gift Company, having filed in this Court on April 23, 1956, his petition to review and set aside an order to cease and desist issued against him on February 16, 1956, in a proceeding before the said respondent entitled "in the matter of Carl Drath, and individual trading as Broadway Gift Company, Docket No. 6185;" and a copy of said petition having been served upon the respondent; and the respondent having thereafter certified and filed in this Court, as required by the Federal Trade Commission Act, a tran-

script of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument; and this Court thereafter fully considered the matter and having rendered its decision on December 13, 1956, affirming said order to cease and desist:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the aforesaid petition to review be, and the same hereby is, dismissed, and that the said order to cease and desist be, and it hereby is, affirmed and enforced, and petitioner is hereby commanded to obey said order to cease and desist and to comply therewith.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that within ninety (90) days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which he has complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1)of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

Wilbur K. Miller
Charles Fahy
John A. Danaher
United States Circuit Judges

Entered January 9 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 755

CARL DRATH, T/A BROADWAY GIFT COMPANY,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 22–25) is reported at 239 F. 2d 452.

JURISDICTION

The judgment of the Court of Appeals (Pet. 25–26) affirming and enforcing the Commission's cease-and-desist order was entered on January 9, 1957. The petition for a writ of certiorari was filed on February 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1)

QUESTIONS PRESENTED

1. Whether, in connection with the interstate sale and distribution of merchandise, it is an unfair act or practice under Section 5 of the Federal Trade Commission Act to supply others with lottery devices designed or intended to be used in the intrastate sale of such merchandise to the public.

2. Whether Section 9 of that Act, which provides that no person shall be subjected to any "penalty or forfeiture" on account of any testimony given before the Commission in compliance with a subpoena, precludes the Commission from relying upon such testimony in issuing a cease-and-desist order.

3. Whether a majority of the members of the Commission constitute a quorum which may perform the Commission's quasi-judicial functions.

STATUTE INVOLVED

Sections 1, 5 (a), and 9 of the Federal Trade Commission Act, 38 Stat. 717, *et seq.*, as amended, 15 U. S. C. 41, *et seq.*, provide in part as follows:

> Sec. 1. A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate.
>
> * * * * *
>
> Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive

acts or practices in commerce, are declared unlawful.

* * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

Sec. 9. * * * No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: * * *

STATEMENT

In February 1954, the Federal Trade Commission issued a complaint charging petitioner with unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. 45), namely, using lottery schemes or games of chance in the interstate sale and distribution of merchandise. After a hearing, the Commission (two

members not participating) held that petitioner had violated the Act as charged, and issued a cease-and-desist order. The court of appeals unanimously affirmed and enforced the Commission's order.[1]

The Commission made the following findings: Petitioner distributes a variety of merchandise (including cameras, watches, jewelry, safety razors, and household and toilet articles) through the use of lottery devices known as pull cards and push cards. Petitioner mails such cards to members of the public whom he regards as prospective distributors of the merchandise. The cards contain a number of pull or push tabs, each of which conceals the name and price of an article of merchandise. A person who pulls or pushes a tab pays the disclosed amount, which varies among tabs. On the push cards, three of the tabs entitle the holders to designated articles of merchandise; the holders of the other tabs receive nothing. On the pull cards, each tab holder receives a small article, and one holder also receives a major article. The identity of the tabs which entitle one to the particular articles is not disclosed until all of the tabs have been pushed or pulled. After the cards have been completely pushed or pulled, the person circulating it remits the proceeds to petitioner, who in turn forwards the designated merchandise, together with an article for the person circulating the card.

[1] Prior to its final judgment in the case, the court of appeals enjoined, *pendente lite*, the practices prohibited by the cease-and-desist order. This Court declined to review that order. *Drath* v. *Federal Trade Commission*, No. 437, this Term, certiorari denied, 352 U. S. 917.

The Commission ordered petitioner to cease and desist from:

> 1. Supplying to or placing in the hands of others pull cards, push cards or any other devices which are designed or intended to be used in the sale or distribution or [of] respondent's merchandise to the public by means of a game of chance, gift enterprise or lottery scheme;
>
> 2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme.

ARGUMENT

1. Contrary to petitioner's principal contention (Pet. 10–15), it is well settled that the Commission may prevent the interstate distribution of merchandise through gambling devices which ultimately are used in making intrastate sales. In *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, this Court unanimously held that it was an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, to employ a merchandising scheme for the interstate sale of penny candy to children where the price depended upon chance. Commission orders prohibiting the interstate distribution of pull and push cards used for the distribution of merchandise have been upheld by courts of appeals in every circuit in which their validity has been litigated, and this Court repeatedly has refused to review such decisions. *Seymour Sales Co.* v. *Federal Trade Commission*, 216 F. 2d 633, 635–636

and cases there cited (C. A. D. C.), certiorari denied, 348 U. S. 928; *U. S. Printing & Novelty Co.* v. *Federal Trade Commission,* 204 F. 2d 737 (C. A. D. C.), certiorari denied, 346 U. S. 830; *Halseth* v. *Federal Trade Commission,* C. A. 7, No. 11,022, September 15, 1954, unreported, certiorari denied, 348 U. S. 928; *Lichtenstein* v. *Federal Trade Commission,* 194 F. 2d 607 (C. A. 9), certiorari denied, 344 U. S. 819; *Feitler* v. *Federal Trade Commission,* 201 F. 2d 790 (C. A. 9), certiorari denied, 346 U. S. 814; *Universal Manufacturing Co.* v. *Federal Trade Commission,* 204 F. 2d 272 (C. A. 10), certiorari denied, 346 U. S. 856. Indeed, the cease-and-desist orders upheld in the *Seymour Sales, Lichtenstein* and *U. S. Printing* cases, *supra,* contained provisions identical to those here challenged.

The decision below is not, as petitioner argues (Pet. 12–13), in conflict with *United States* v. *Halseth,* 342 U. S. 277. The *Halseth* case held that the initial distribution of push-card devices did not violate the criminal statute (18 U. S. C. 1302) prohibiting the mailing of matter "concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance," on the ground that the statute applied only to an "existing, going lottery or gambling scheme" (p. 280), and not to one that was just getting under way. But petitioner's guilt or innocence under the criminal statute is immaterial in determining whether the scheme violates Section 5 of

the Federal Trade Commission Act. For, as this Court stated in the *Keppel* case, *supra* (p. 313), the sale of merchandise through gambling devices is "unfair" within the meaning of the statute, irrespective of whether the conduct comes within "criminal statutes imposing penalties on gambling, lotteries and the like * * *." A similar contention was made to this Court unsuccessfully in the *U. S. Printing, Seymour Sales* and *Halseth* cases, *supra*, pp. 5–6 (No. 273, Oct. Term, 1953, and Nos. 484 and 485, Oct. Term, 1954, respectively).

2. Petitioner next argues (Pet. 15–18) that since he testified at the Commission hearing pursuant to subpoena, Section 9 of the Federal Trade Commission Act precluded the Commission from relying on that testimony in entering its order. That Section provides that no person shall be subject to "any penalty or forfeiture" on account of any testimony given before the Commission in compliance with a subpoena. But, as the court of appeals pointed out (Pet. 24) in rejecting this argument, the Act "does not immunize a witness from a cease and desist order, which is prospective only and has been aptly described as 'purely remedial and preventative.'" See *United States* v. *La Franca*, 282 U. S. 568, 572. Injunctive relief is not a "penalty" or "forfeiture," *Bowles* v. *Misle*, 64 F. Supp. 835, 838 (D. Neb.), and the immunity clause does not bar a cease-and-desist order.

Standard Distributors, Inc. v. *Federal Trade Commission*, 211 F. 2d 7, 14 (C. A. 2).[2]

3. Finally, petitioner contends (Pet. 19–21) that the cease-and-desist order is invalid because only three of the five members who comprise the Commission decided the case. It argues that the long standing provision in the Commission's Rules of Practice that a majority of its membership constitutes a quorum is applicable only to administrative and not to quasi-judicial proceedings.

Since the Federal Trade Commission Act does not specify how many members constitute a quorum, the court of appeals correctly applied the "familiar principle that an authority given to several for public purposes may be executed by a majority of their number." *Cooley* v. *O'Connor*, 12 Wall. 391, 398; see, also, *Frischer and Co.* v. *Bakelite Corp.*, 39 F. 2d 247, 254 (C. C. P. A.), certiorari denied, 282 U. S. 852 (majority of members of United States Tariff Commission constitute a quorum). The Commission's quorum rule is, as the court ruled (Pet. 24), "a proper one" which "applies to all agency action," adjudicative as well as administrative.

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[2] *United States* v. *Minker*, 350 U. S. 179, upon which petitioner relies (Pet. 17–18), is not in point. The case involved only the interpretation of Section 235 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 198, 8 U. S. C. 1225, which gives immigration officers the power by subpoena to require the attendance and testimony of "witnesses." The Court held that, in an investigation to determine whether good cause exists for the institution of denaturalization proceedings against a naturalized citizen, the citizen under investigation is not a "witness" subject to subpoena under that Section.

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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MARCH 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957